No. 10-809

IN THE

Supreme Court of the United States

CHARLES FRANKLIN MURDOCH, JR., *Petitioner*,

v.

ROY CASTRO, WARDEN, AND
EDMUND G. BROWN, JR., ATTORNEY GENERAL
OF THE STATE OF CALIFORNIA, *Respondents*.

On Petition For Writ of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY TO THE STATE'S ARGUMENTS

I. AEDPA DEFERENCE

A. *Richter* Vindicates Judge Kozinski's Dissent

The State quotes only the first paragraph of the relevant five-paragraph holding in *Harrington v. Richter*, 131 S. Ct. 770, 784-85 (2011). The subsequent four paragraphs demonstrate that the Ninth Circuit applied an incorrect legal standard.

The petitioner in *Richter* filed his original habeas corpus petition with the California Supreme Court, 131 S. Ct. at 783, bypassing the California Court of Appeal. He received only a one-page denial. Relying on the principles of federalism underlying the AEDPA, *Richter* rejected the contention that the California Supreme Court needed to state its reasons in denying the 3,400 original habeas petitions on which it rules each year. "[R]equiring a statement of reasons could undercut state practices designed to preserve the integrity of the case-law tradition. The issuance of summary dispositions in many collateral attack cases can enable a state judiciary to concentrate its resources on the cases where opinions are most needed." *Id.* at 784. Only "the California courts or Legislature," not the federal courts, could "alter the State's practices or elaborate more fully on their import." *Id.* at 785.

But *Richter* clarified that the AEDPA permits a petitioner to obtain *de novo* review if he can affirmatively demonstrate that the state court failed to adjudicate his claim on the merits. Although "it may be presumed that the state court adjudicated

the claim on the merits in the absence of any indication or state-law procedural principles to the contrary," this "presumption may be overcome when there is reason to think some other explanation for the state court's decision is more likely." 131 S. Ct. at 784-85.

Richter thus vindicates Judge Kozinski's dissent in this case. The Court of Appeal's opinion, which addressed both Murdoch's direct appeal and his habeas petition, App. 98, was subject to the requirement that "[d]ecisions of the Supreme Court and courts of appeal that determine causes shall be in writing with reasons stated." Cal. Const. art. VI, § 14.[1] Although "something as concise as 'Defendant's remaining contentions do not merit discussion' will suffice . . . " *something* must be said to indicate that the court is aware of the remaining issues and has resolved, rather than overlooked, them. App. 38 (citing *Lewis v. Superior Court*, 970 P.2d 872 (Cal. 1999); *People v. Rojas*, 173 Cal. Rptr. 64 (Ct. App.1981)) (emphasis in original). This "state-law procedural principle[]," *Richter*, 131 S. Ct. at 784, aids Murdoch in overcoming the AEDPA presumption.

Although the Court of Appeal did not need to affirmatively cite and distinguish Murdoch's cited authorities, *Lewis*, 970 P.2d at 894, the strength of

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[1] By contrast, because the California Supreme Court in *Richter* denied the petition without issuing an order to show cause or alternative writ, that petition did not trigger Cal. Const. art. VI, § 14. *See In re Mazoros*, 142 Cal. Rptr. 609, 610 (Ct. App. 1977).

Murdoch's claim under existing California and federal cases indicates that the Court of Appeal simply missed the claim. App. 36-41.

The State's strategy of ignoring the Confrontation Clause issue carried the day in the Court of Appeal. "If you wonder how this could have happened, just read the state's response brief in the court of appeal. Like the court of appeal's opinion, it cites neither *Vela* nor *Mincey*." App. 37. "The state nowhere engages Murdoch's Sixth Amendment claim or so much as mentions his Confrontation Clause arguments about the letter." *Id.*

The plurality responded that "[w]hether the state court adequately responded to Murdoch's Confrontation Clause argument, however, is irrelevant," and that AEDPA deference automatically applies unless a state court "clearly indicated that it had not reached the merits of [the] claim." App. 16.

The State insists, however, that Murdoch has taken this quote out of context. A review of the relevant footnote in its entirety, however, shows that the plurality merely acknowledged the State's and Judge Kozinski's competing readings of the Court of Appeal's decision:

> The California Court of Appeal, which rendered the last reasoned state court decision in this case, addressed Murdoch's Confrontation Clause argument only obliquely. It did not mention the Confrontation Clause in its opinion, but it did discuss and quote

from the section of Murdoch's brief in which he raised the issue. The court also quoted from *People v. Godlewski*, 17 Cal. App. 4th 940, 21 Cal. Rptr. 2d 796, 800 (1993), a case that dealt with the tension between the attorney-client privilege and the Confrontation Clause. Whether the state court adequately responded to Murdoch's Confrontation Clause argument, however, is irrelevant. Even when there is no reasoned state court opinion explaining the denial of a defendant's claim in any respect, we "must assume that the state court has decided all the issues and 'perform an independent review of the record to ascertain whether the state court decision was objectively reasonable.'" [*Reynoso v. Giurbino*, 462 F.3d 1099, 1109 (9th Cir. 2006)] (quoting *Pham v. Terhune*, 400 F.3d 740, 742 (9th Cir.2005) (per curiam)) (internal quotation marks omitted). Thus we do not review Murdoch's claim de novo, as we would if the state court had clearly indicated that it had not reached the merits of Murdoch's claim. *See id.*; [*Pirtle v. Morgan*, 313 F.3d 1160, 1167 (9th Cir. 2002).]

The dissent refuses to accept these established principles of AEDPA review. Instead, it spends several pages discussing the state appellate court's

> duty under state law to "analyze[ ] ... [each] contention" and convinces itself that the state court erroneously "decline[d] to reach [the] issue" and "overlooked" it. *See* Diss. op. at 999-1001. But whether we review a claim de novo under the AEDPA is a question of federal law and, on that question, as explained above, we are bound by *Reynoso* and *Pirtle*.

App. 16.[2]

Rather than accept the State's reading of the Court of Appeal's decision, the plurality relied on authority regarding the standard of review "when there is no reasoned state court opinion explaining the denial of a defendant's claim in any respect." *Id.* Unable to deny that the Ninth Circuit is "the only court in the country to hold that a state court may adjudicate a constitutional claim 'on the merits' by overlooking it," App. 60, the plurality concluded that Ninth Circuit law mandated this approach.

By treating the AEDPA presumption as irrebuttable, except by an express statement declining to address the federal claim, the Ninth Circuit applied the wrong legal standard. The assumption is rebuttable under *Richter*. Certiorari is necessary to address this published misstatement of the law.

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[2] Only three members of the panel accepted the State's argument regarding *Godlewski*. App. 68. Murdoch addresses the merits of that argument in the next section.

B. Certiorari Is Appropriate Regarding the Application of *Richter*'s "More Likely Explanation" Standard

In any event, certiorari is appropriate regarding the application of *Richter*. Murdoch need only show that his "explanation for the state court's decision is more likely," 131 S. Ct. at 784-85, not correct beyond reasonable doubt. Because the petitioner in *Richter* offered "pure speculation," *id.* at 785, that decision provides little guidance regarding the quantum of evidence that would be sufficient.

The Sixth Circuit, for instance, held *de novo* review to be appropriate where the petitioner raised the same issues regarding jury polling and judicial bias under both federal and state law, but the state court "addressed [the] claims only in state-law terms in its decision." *Lyell v. Renico*, 470 F.3d 1177, 1182 (6th Cir. 2006). This holding is directly contrary to the State's argument.

Applying a burden similar to *Lyell*, the Seventh Circuit applied *de novo* review where the Indiana courts addressed only the claim that his counsel was ineffective for failing to call him as a witness in his own defense, while missing the nuance that the petitioner also asserted that his counsel was ineffective for failing to consult with him on the issue. *Canaan v. McBride*, 395 F.3d 376, 381-82 (7th Cir. 2005) (Wood, J.). *See also Norde v. Keane*, 294 F.3d 401, 410 (2d Cir. 2002) (opinion lacked general language that remaining issues considered and rejected); *Shelton v. Purkett*, 563 F.3d 404, 409 (8th

Cir. 2009) (petitioner given "benefit of the doubt" where opinion susceptible to conflicting inferences).

If the Ninth Circuit accepted the State's reading of the Court of Appeal's decision, its holding directly conflicts with *Lyell*, 470 F.3d at 1182. And, as Judge Kozinsky details, such an interpretation would place a far greater burden on the petitioner than has any other court. The record demonstrates that the Court of Appeal overlooked Murdoch's Confrontation Clause claim: the State simply ignored the issue in its response brief; the opinion addressed Murdoch's every other contention in detail; the opinion discussed the letter and *Godlewski* only in the context of state-law claims; and the federal claim found strong support in *People v. Mincey*, 827 P.2d 388, 422 (Cal. 1992), *Vela v. Superior Court*, 255 Cal. Rptr. 921, 926 (Ct. App. 1989), and decisions of this Court. App. 36-41. Further, *Swidler & Berlin v. United States*, 524 U.S. 399 (1998), the decision allegedly creating ambiguity in this Court's Confrontation Clause jurisprudence, postdated the Court of Appeal's decision.

The State responds, however, that the Court of Appeal adjudicated the Confrontation Clause claim by citing, amidst a discussion of state-law privilege questions, "the section of [*Godlewski*] that dealt with that federal issue." Opp. Br., at 12. Such an interpretation of *Richter*'s "more likely explanation" standard strains credulity. Just as petitioner cannot employ pure speculation to meet his burden under *Richter*, the State cannot invoke AEDPA deference by scouring the authorities cited in the Court of

Appeal's decision for unstated grounds on which it could have ruled.

Moreover, *Godlewski* was far from dispositive of Murdoch's federal claim. In that case, one defendant, Flack, sought to pierce the attorney-client privilege of his codefendant, Godlewski, to introduce "statements made by Godlewski to his lawyer" allegedly constituting "an admission by Godlewski that he (Godlewski), not Flack, actually committed the murder." 21 Cal. Rptr. 2d at 797. The court declined to invade Godlewski's own federal right to effective assistance of counsel. *Id.* at 799. The court distinguished *Vela*, which "had no reason to even consider the extent to which such disclosure could impact upon a codefendant's constitutional right to competent representation." *Id.* at 801 n.27. It further distinguished authorities that "involved an attempt to breach the attorney-client privilege held by an accomplice who had already pled guilty; at bench, Flack seeks to penetrate the confidential attorney-client relationship of a codefendant who is being jointly tried." *Id.* at 801. By its express terms, *Godlewski* was easily distinguishable as involving a conflict between the federal constitutional rights of two codefendants being jointly tried.

To accept the State's argument would be to raise Murdoch's burden well above *Richter*'s "more likely explanation" standard. Given that this issue has arisen in five different Circuits in recent years, with the Sixth Circuit's *Lyell* decision directly contravening the State's argument here, this Court should grant certiorari to address the application of the *Richter* burden.

II. THE MERITS OF THE CONFRONTATION CLAUSE CLAIM

A. The Superior Court Restricted the Scope of Cross-Examination

All members of the en banc panel agreed that the Superior Court's ruling restricted cross-examination. App. 7 ("The court concluded that Dinardo's letter . . . was protected by the attorney-client privilege and thus could not be used, on cross-examination, to impeach Dinardo."); App. 29-30, 68. Yet the State contends "'the trial court placed no limitation on the scope of cross-examination.'" Opp. Br., at 19 (quoting *Pennsylvania v. Ritchie*, 480 U.S. 39, 45 (1987)), and that preservation of Murdoch's Confrontation Clause claim required that he attempt to cross-examine Dinardo to elicit the substance of that communication.

But the attorney-client privilege protects the "information" that the client transmits in confidence to his attorney. Cal. Evid. Code § 952. The information at issue was that Dinardo had made a prior inconsistent statement that was exculpatory in nature.

In California, as in all jurisdictions, a party may question a witness regarding the circumstances of an attorney-client communication, to determine whether the privilege applies, but questioning regarding the substance of the communication is permissible only after the trial court finds the privilege inapplicable or waived. *People v. Durrant*, 48 P. 75, 86 (Cal. 1897). The Superior Court, upon review of Dinardo's letter, ruled: "I see no exception

to the attorney-client privilege, in my opinion, it's inviolate insofar as these facts are concerned." Opp. Br., App. 30.

This ruling gave Murdoch no option or opportunity to elicit this prior inconsistent statement from Dinardo on cross-examination, with or without the letter. Indeed, it is "misconduct" for an attorney "to ask questions calling for inadmissible and prejudicial answers." *People v. King*, 72 Cal. Rptr. 478, 495 (Ct. App. 1968).

Thus, Murdoch does not seek to establish a right of pretrial discovery in contravention of *Ritchie*. Dinardo was on the stand, and the prosecutor complied with her obligation under *Giglio v. United States*, 405 U.S. 150, 153-55 (1972),[3] to inform the court and Murdoch of the prior inconsistent statement that "Dinardo was coerced by the police into implicating defendant Murdoch." Opp. Br., App. 1. At that point, the question became not one of pretrial discovery, or of prosecutorial disclosure, but of the scope of cross-examination that the Superior Court would permit. The Superior Court's ruling

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[3] The State mischaracterizes the Petition as raising a new *Brady* claim on appeal. Murdoch cited *Giglio* precisely to illustrate that the appeal turns not on *Brady* disclosure issues but on court-imposed restrictions on cross-examination. The State was the party, if any, to waive its argument. It has never contended that Murdoch needed to conduct further questioning to preserve his Confrontation Clause claim. *Showers v. Beard*, 635 F.3d 625 (3d Cir. 2011) (state "waived its procedural default argument, raising this issue for the first time after over a decade of post conviction litigation").

restricted the scope of cross-examination in violation of *Ritchie*.

B. The Ninth Circuit's Analysis Was Not Limited to the Attorney-Client Privilege

Although the State stresses the special importance of the attorney-client privilege, the Ninth Circuit relied principally: (1) on Eighth Circuit authority regarding the physician-patient privilege; and (2) on a footnote in *Swidler*, 524 U.S. at 409 n.3, acknowledging the law firm's concession that a criminal defendant's constitutional rights could warrant breaching the privilege.

This argument illustrates that the stakes are not limited to the attorney-client privilege. By the logic of the Eighth and Ninth Circuits, each time that this Court expressly declines to reach an issue—even a conceded issue regarding clearly established federal law—the resulting dicta could create ambiguity precluding federal review on that point under the AEDPA.

The Court should grant certiorari to clarify that the *Swidler* dicta, which should play no role in the AEDPA analysis, *Carey v. Musladin*, 549 U.S. 70, 74 (2006), did not open the door to state-law privileges trumping federal constitutional rights under the Supremacy Clause.

C. The Error Was Prejudicial

The en banc Ninth Circuit never reached the question of whether the error was harmless or prejudicial. *See Murdoch v. Castro*, 546 F.3d 1051, 1051 (9th Cir. 2008), *vacating* 489 F.3d 1063 (9th

Cir. 2007). If this Court finds a violation of Murdoch's Confrontation Clause rights, the Court may either reach the question of prejudice or remand for further consideration.

The State is correct that this Court recently clarified that the appropriate test on collateral review is whether the error "'had substantial and injurious effect or influence in determining the jury's verdict.'" *Fry v. Pliler*, 551 U.S. 112, 116 (2007). But Murdoch is plainly entitled to relief under the "substantial and injurious effect" test.

No forensic evidence pointed to Murdoch. App. 4. The identification witnesses were Dinardo and a bartender who first identified Murdoch 11 years after the crime. App. 4, 7. The bartender "was shown Murdoch's picture in a photo array immediately after the robbery and didn't recognize him. More than a dozen years later, she points to the only defendant in the courtroom and is sure it's him. Weak tea." App. 55.

Dinardo's credibility thus was critical to Murdoch's conviction. *Davis v. Alaska*, 415 U.S. 308, 317-18 (1974), found manifest prejudice where the accused could not cross-examine his principal accuser as to matters of general credibility. Here, the excluded evidence specifically contradicted the principal accuser's identification testimony.

The State points to Murdoch's ability to impeach Dinardo by establishing that Dinardo had a prior criminal record, that the possibility of a reduced sentence gave Dinardo a motive to lie, and that Dinardo originally lied to the police about his own

involvement in the crime. But Murdoch had no luck in attempting a direct impeachment of Dinardo's identification of Murdoch, as Dinardo denied that the police had pressured him to implicate Murdoch in the crime. Opp. Br., App. 20-23.

It was one thing for Dinardo to offer a self-interested denial of his own involvement in the crime. It was another thing entirely for him to deny Murdoch's involvement. Notwithstanding the statement by Dinardo's attorney that the letter was unreliable, the "were you lying then or are you lying now" impeachment would have driven home that Dinardo would lie about anything, including Murdoch's guilt or innocence, to suit his purpose at any given time.

Because the error had a substantial and injurious effect or influence in determining the jury's verdict, this Court should direct the issuance of a writ of habeas corpus.

CONCLUSION

The Court should grant the petition for certiorari and vacate or reverse the judgment of the Ninth Circuit.

Respectfully submitted:

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